Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
RETENTION BY BROADCASTERS OF PROGRAM RECORDINGS	)	MB Docket No. 04-232

To: The Commission

COMMENTS OF

STATION RESOURCE GROUP

AND

NATIONAL FEDERATION OF COMMUNITY BROADCASTERS

August 27, 2004

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Summary

The proposed rule is analogous to former Section 399(b) of the Communications Act, which was found to infringe the First Amendment rights of NCE broadcasters. FCC data indicate that the rule would not substantially enhance the indecency complaint process, and would, in fact, merely multiply the number of complaints filed against the same small number of programs. The rule is breathtakingly inefficient. It imposes enormous regulatory burdens, particularly on NCE stations, without substantially advancing its stated goal - the improvement of the indecency complaint process. Finally, and perhaps most importantly, the rule could easily be misused to intimidate NCE stations, who are subject to a wide range of content-related requirements.

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COMMENTS

The Station Resource Group ("SRG") and the National Federation of Community Broadcasters ("NFCB") herewith submit comments in response to the above-captioned Notice of Proposed Rulemaking ("NPRM").[1]

The NPRM invites comment on a proposed rule that would require each broadcast station to record all programs broadcast between 6:00 a.m. and 10:00 p.m. each day, and to retain those recordings for a period of 60 or 90 days. These comments oppose the adoption of the rule.

Introduction: Uniqueness of NCE Stations

SRG is a membership organization comprised of some of public radio's leading noncommercial educational ("NCE") broadcasters. SRG's 42 members operate 170 public radio stations across the country, account for a significant portion of public radio's national audience and produce much of public radio's acclaimed national programming.

NFCB's members are noncommercial, educational, public radio stations as well as independent producers, Low power FM stations, and other noncommercial organizations such as

[1] The deadline for filing comments was extended to August 27, 2004, by *Order*, 19 FCC Rcd 13323, released July 22, 2004.

American Indian Radio on Satellite ("AIROS") and Radio Bilingüe Satélite ("RBS"). Its members operate throughout the United States, from Alaska to Florida, from major markets to small Native American reservations. Nearly half of its members are minority-owned, and 41% of its members serve rural communities.

NCE stations differ from commercial stations in several ways relevant to this NPRM.

- NCE stations are subject to a variety of content restrictions that do not apply to commercial stations. These include prohibitions against the acceptance of any remuneration in exchange for promoting for-profit entities, expressing the views of any person with respect to any matter of public importance or interest, or supporting or opposing any candidate for political office. 47 U.S.C. § 399B(a)(1)-(3). Even in the absence of any remuneration, no NCE station may support or oppose any candidate for political office. 47 U.S.C. § 399. NCE stations licensed to tax-exempt organizations are subject to IRS regulations that prohibit the non-profit from engaging in lobbying or participating in certain political activities. See IRC § 501(c)(3). NCE stations that receive funds from the Corporation for Public Broadcasting ("CPB") are required to adhere strictly "to objectivity and balance in all programs." 47 U.S.C. § 396(g)(1)(A).
- NCE stations often operate on a fixed budget established by a governmental body, an educational institution, a tribe or a tax-exempt organization. Their ability to raise money to comply with new regulatory requirements is limited.
- NCE stations often rely heavily on volunteers, students, or other unpaid staff. Their ability to devote administrative resources to new recordkeeping requirements is limited.

As discussed below, these distinctive characteristics of NCE stations increase both the Constitutional burden and the administrative cost of the proposed rule.

1. <u>The Proposed Rule Would Be Unconstitutional</u>.

In *Community-Service Broadcasting of Mid-America v. FCC,* 593 F.2d 1102 (D.C. Cir. 1978), the United States Court of Appeals for the District of Columbia Circuit struck down former Section 399(b) of the Communications Act, which required noncommercial stations to retain audio programs for 60 days. Prophetically, the Court held that such a requirement not only violated the First Amendment rights of public broadcasters, but potentially chilled the rights of all broadcasters:

> In this case the spectre of government censorship and control hovers, not only over public broadcasting, but over all broadcasting. For if this legislation is constitutional as to public broadcasting, similar legislation as to all broadcasting is waiting in the wings. If the Government can require the most pervasive and effective information medium in the history of this country to make tapes of its broadcasting for possible government inspection, in its own self-interest that medium will trim its sails to abide the prevailing winds.

593 F.2d at 1123.

For Constitutional purposes, the provision struck down in *Community-Service Broadcasting* is indistinguishable from the rule proposed in the NPRM. Section 399(b) of the Communications Act required NCE broadcasters to retain recordings of all broadcasts "in which any issue of public importance is discussed." Stations were required to retain audio programs for 60 days, to provide a copy to the Commission on request, and to provide copies to the public. The stated purpose of the provision was to "facilitate the public's access to programming previously broadcast," *Id* at 1111, note 22, and to help Congress determine whether noncommercial stations funded by CPB adhered "to objectivity and balance in all programs or series of programs of a controversial nature." 47 U.S.C. § 396(g)(1)(A). Based on these facts, the court held that the program retention requirement "places substantial burdens on noncommercial educational broadcasters and presents the risk of direct governmental interference in program content." Id. at 1105.

The proposed rule suffers from the same defects. It creates a high risk of extensive governmental interference in program content, and, as discussed below, places substantial burdens on NCE broadcasters.

Although the NPRM suggests that the primary purpose of imposing a recording requirement on broadcasters is to enhance the processing of indecency complaints, it recognizes that such recordings could be used for many other purposes. NRPM at para. 7. For the reasons noted above, NCE stations are uniquely subject to a number of content-related restrictions, and would therefore be uniquely susceptible to uses, and misuses, of the requirement that they maintain copies of recorded programs.

The NPRM is silent on the critical issue of whether the recorded programs would have to be kept in a station's public file, or otherwise be made available to the public, but even if retained programs were not made part of the public file, the proposed rule would subject NCE stations to an unprecedented potential for governmental intrusion into program content. Has an NCE station arguably broadcast a "view" on a subject of public importance or interest? Aired a statement that supports or opposes a political candidate? Advocated a position on a matter of pending legislation? Aired a program possibly lacking in objectivity and balance? Broadcast a program injurious to the reputation of a public official? The proposed rule would provide a new basis for investigating all these questions. If a station's programming had to be retained for 60 to 90 days, such records would undoubtedly be subject to subpoena or other legislative, judicial or regulatory scrutiny. The FCC, Congress, CPB, and public officials would be able to subject programming on NCE stations to a level of governmental interference that would make the former "Fairness Doctrine" seem benign by comparison.

In fact, of course, the Fairness Doctrine was declared unconstitutional precisely because it allowed the government to investigate program content at will. This threat was found to chill broadcasters' willingness to air potentially controversial or fringe programming, and thereby to diminish the variety of programming that would be available to the public. *See Syracuse Peace Council v. FCC*, 867 F.2d 654, 663 (D.C. Cir. 1989), cert denied, 493 U.S. 1019 (1990) (in upholding the FCC's decision to repeal the fairness doctrine, the court recognized that "[t]he fairness doctrine applies to ordinary mortals who adjust their affairs on the basis of estimates of risk.").

2. <u>The Proposed Program Rule Would be Arbitrary and Capricious</u>.

The proposed requirements are designed to "enhance" the FCC's power to enforce its indecency policy and "improve the adjudication of complaints." NPRM, ¶¶ 3, 6. By the Commission's own account, however, only approximately 1% of complaints are currently dismissed for lack of a tape, transcript or significant excerpt. *See* NPRM, Note 8 (of 14,379 complaints filed between 2000 and 2002, only 169 complaints (1.18%) were dismissed for lack of a tape, transcript or excerpt).

In addition, FCC records indicate that, although the number of indecency complaints have risen astronomically (from 111 in year to 2000, to 831,358 in year 2004), the number of broadcast *programs* that are the subject of complaints has increased only modestly.

INDECENCY COMPLAINTS and NALs: 1993 - 2004

Calendar Year	# of Complaints Received	# of Programs By Service	# of NALs	# of NALs By Service	$ Amount of NALs	Status
2004	831,358 (146 programs)	Radio: 58 TV: 66 Cable: 22	7	Radio: 6 TV: 1	$2,805,5003	4 paid, 2 pending, 1 cancelled
2003	240,342 (375 programs)	Radio: 122 TV: 217 Cable: 36	3	Radio: 3	$440,000	1 paid, 2 pending
2002	13,922 (389 programs)	Radio: 185 TV: 166 Cable: 38	7	Radio: 7	$99,400	2 paid, 2 agreed to be paid, 2 pending, 1 cancelled
2001	346 (152 programs)	Radio: 113 TV: 33 Cable: 6	7	Radio: 6 TV: 1	$91,000	5-paid, 2-cancelled
2000	111 (111 programs)	Radio: 85 TV: 25 Cable: 1	7	Radio: 7	$48,000	5-paid, 1 agreed to be paid, 1 pending at DOJ
1999	N/A	N/A	3	Radio: 3	$49,000	3 paid
1998	N/A	N/A	6	Radio: 6	$40,000	5 paid, 1 not prosecuted by DOJ
1997	N/A	N/A	7	Radio: 6 TV: 1	$35,500	5 paid, 2 cancelled
1996	N/A	N/A	3	Radio: 3	$25,500	1 paid, 2 cancelled
1995	N/A	N/A	1	Radio : 1	$4,000	1 paid
1994	N/A	N/A	7	Radio: 7	$674,500	4 paid, 3 cancelled
1993	N/A	N/A	5	Radio: 5	$665,000	4 paid, 1 cancelled

In year 2000, there were complaints about 85 radio programs and 25 television programs (a total of 110 broadcast programs) and the Commission issued a total of seven Notices of Apparent Liability ("NALs"). In year 2002, the number of programs about which the FCC received complaints increased to 185 radio and 166 television programs (a total of 351), but the number of NALs remained unchanged at seven. In year 2003, the number of programs about which the FCC received complaints declined slightly to 122 radio programs and 217 TV programs (a total of 339), and the number of NALs declined to three. From January to August 13, 2004, the Commission received complaints about 58 radio programs and 66 TV programs (a total of 124), and has issued seven NALs.

These statistics do not indicate that the current complaint process should be "enhanced." On the contrary, the data indicate that the number of complaints and the number of NALs are inversely related, and that it would, in fact, be irrational to encourage a larger number of duplicative complaints about the same programs, in order to punish only a small number of

violators. Over the past ten years, the number of NALs has averaged five per year, and has never exceeded seven in any given year, even in years in which hundreds of thousands of complaints were filed. Over the past two years, the number of complaints has dramatically increased, but the number of programs that are the object of complaints has declined, perhaps in response to higher forfeiture levels.

The three to seven NALs issued each year pertain to only a few hours - and in some cases only a few seconds - of programming. By contrast, the proposed rule would require each broadcaster to record and retain at least 16 hours of programming per day (i.e., from 6 a.m. until 10 p.m.) for at least 60 days, for a total of 960 hours of recorded programming. Multiplying that number by the approximately 18,000 licensed broadcasters[2] produces the staggering number of 17,280,000 hours of programming that would have to be recorded at any given time, and 105,120,000 hours of programming per year. Assuming that each NAL relates to an hour of programming and that there are, on average, five NALs per year, the ratio of programming that violates the indecency rules to the programming required to be recorded (i.e. 5/103,680,000) is 0.000000047. Put another way, the proposed rule would require broadcasters to record more than one hundred million hours of programming to provide a better "context" for the *one* program that is likely to be found indecent. Those may be acceptable odds for a ticket in a Powerball Lottery, but they are not acceptable odds that the proposed regulation will "improve" the FCC's indecency complaint process.

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[2] Broadcast station totals as of June 30, 2004, were 4,771 AM stations, 6,218 commercial FM stations, 2,497 noncommercial FM stations, 1,366 commercial TV stations, 382 noncommercial TV stations, and 2,727 low power TV and Class A TV stations, totaling 17,960 broadcast stations that would be subject to the program recording requirement. *FCC News, Broadcast Station Totals As Of June 30, 2004*, released August 20, 2004. The New release does not include low power FM station totals, but a search of the FCC's web site (http://www.fcc.gov/mb/audio/lpfm/index.html) listed 280 licensed LPFM stations.

The current complaint process considers 99% of the complaints filed, and apparently captures most of the violations of the indecency policy, since the number of violations do not increase with the number of complaints. Thus, even if the proposed rule did not infringe First Amendment rights nor impose significant costs on NCE broadcasters, it would not substantially advance a compelling governmental interest. To the extent that the rule would merely encourage duplicative complaints about the same programs, it is, in fact, counterproductive, since it consumes administrative resources and burdens constitutionally protected activities without detecting additional indecency violations.

3. The Proposed Rule Would Impose Significant Burdens on NCE Stations.

The proposed requirements would fall, like regulatory rain, on the just and the unjust alike. The rule would apply to all broadcasters, regardless of their ability to afford such burdens, or the likelihood that they will violate indecency rules. These burdens are particularly severe for NCE stations, including new LPFM stations, for whom the costs of recording and storing copies of programs cannot be recovered as a business expense.

Because NCE stations operate on limited budgets, and have a limited ability to expand revenues to satisfy new capital and administrative expenses, the proposed rule would impose a significant hardship for many stations. For a college station operating on a fixed budget, an LPFM station struggling to serve a small town, or a rural station with a limited donor base, even small amounts of additional revenue are hard to come by.

4. The Proposed Rule Would Infringe Copyrighted Material.

Under Section 112 of the Copyright Act, 17 U.S.C. §112, broadcasters may make no more than one copy of a digital sound recording. No further copies may be made from that one digital copy and that copy can only be made for archival preservation for transmission within the station's service area. 17 U.S.C. §112(a)(1)(A) & (B). As the purpose for which the FCC would

require recording of programs does not fall within the scope of any statutory license for digital sound recordings,[3] broadcasters would need to obtain the permission of each and every owner of the copyright in the digital sound recording in order to record and transmit a copy of digitally-copied sound recording to the FCC. Permission from owners of the copyright in the underlying musical work (composers and songwriters and/or their publishers) would need to be sought for *both* analog and digital copying, as well, because the blanket licenses obtained from ASCAP, BMI, and SESAC do not cover copying of songs for third parties.[4]

No central clearinghouse exists to secure those permissions. Broadcasters would have to seek out the owners of various different copyrights in each song and program recorded to comply with the proposed rule. Compliance with the FCC's rule would thus impose administrative costs that could greatly exceed the costs of merely recording and storing program material, and force broadcasters unable to bear these costs either to violate FCC rules or to infringe copyrighted works.

Before implementing any rule, the FCC should obtain an opinion from the Copyright Office to determine whether recording and distributing copyrighted works for the purposes set forth in the NPRM would infringe copyrighted matter. If such a rule would infringe copyrights,

[3] Statutory licenses are available under Section 114(f) of the Copyright Act, and apply in the context of streaming music on the Internet. To obtain the statutory license, the transmission service (e.g., the broadcaster) must file a Notice of Use with the Copyright Office in Washington, DC, pay monthly royalties to SoundExchange, keep the required records to file quarterly Reports of Use with SoundExchange, and abide by the programming restrictions described as the "sound recording performance complement" in Section 114(j)(13) of the Copyright Act. The sound recording performance complement means, during a three hour period, the service may not play more than three songs from a particular album and no more than two consecutively, or four songs by a particular artist or from a boxed set, including no more than three consecutively. Repeats of a program are limited to three times in a two-week period for programs under one hour in duration, or four times in a two-week period for programs over one hour. 37 U.S.C. Section 114(j)(13).

[4] For example, the BMI license gives the broadcaster the right to publicly perform the copyrighted song over-the-air or to stream the over-the-air signal on the Internet and specifically prohibits reproduction of the musical composition by any means. *See* BMI License Agreement, para. 3.A, B & E at http://www.bmi.com/licensing/forms/2003_radio_license.pdf.

the rule could not be implemented without modifying the Copyright Act. § 506(a)(2) of the Copyright Act makes copyright infringement – by reproduction or distribution of even one copy of a copyrighted work – a criminal violation. 37 U.S.C. § 506(a)(2). The FCC may not force broadcasters to comply with FCC regulations by committing a criminal act.

5. The Proposed Rule Would Interfere with Contracts.

Many network affiliation agreements prohibit the reproduction, storage and non-broadcast distribution of network programs. For instance, a standard noncommercial license agreement does not permit the station "to perform … reproduce, distribute, transmit or otherwise use" the programming provided. Recording such programs or transmitting these programs to the FCC or to members of the public would thus force the licensee to breach existing network affiliation contracts.

6. If the Proposed Rule is Adopted, the Commission Should Limit its Scope.

Assuming that the proposed rule can be drafted so as not to abridge First Amendment rights, infringe the copyright laws, or force breaches of contracts, the rule should nevertheless be closely tailored to achieve its stated regulatory goal. What follows are specific ways in which the FCC can limit the scope of the proposed rule.

- Use a program retention requirement only as a sanction.

A more rational approach to "improving" the indecency complaint process would be to impose a program retention requirement only on stations that repeatedly violate the indecency rules. Such an approach would target only those broadcasters who have a proclivity to violate the indecency standards, and spare the thousands of broadcasters who have never received an indecency complaint. This approach would also be a far less restrictive alternative to the rule proposed, in that it would not permit recorded programs to be used merely to intimidate NCE stations with respect to a range of content-related requirements.

- Make clear that the recorded programs are confidential documents that will be available only for purposes of demonstrating compliance with FCC indecency regulations.
- Limit the retention period to 30 days.
- Require that indecency complaints be filed during the period for which programs are recorded. It would be irrational to require broadcasters to retain recorded programs for one period of time, only to entertain complaints filed long after such a retention period had expired.
- Limit the application of the rule to commercial broadcast stations. Available FCC statistics indicate that the NALs issued in the past 10 years were issued to commercial stations.[5] Extending the rule to NCE stations imposes a particularly burdensome regulatory duty without advancing substantially a legitimate regulatory goal.

Conclusion

The proposed rule is analogous to former Section 399(b) of the Communications Act, which was found to infringe the First Amendment rights of NCE broadcasters. FCC data indicate that the rule would not substantially enhance the indecency complaint process, and would, in fact, merely multiply the number of complaints filed against the same small number of programs. The rule is breathtakingly inefficient. It imposes enormous regulatory burdens, particularly on NCE stations, without substantially advancing its stated goal - the improvement of the indecency complaint process. Finally, and perhaps most importantly, the rule could easily be misused to intimidate NCE stations, who are subject to a wide range of content-related requirements.

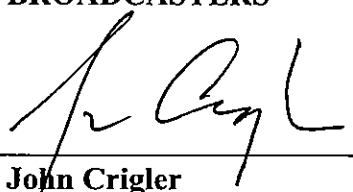
[5] The NAL issued to NCE Station KBOO in 2001 was subsequently rescinded. *Memorandum Opinion and Order,* 18 FCC Rcd. 2472 (EB, February 20, 2003).

Accordingly, SRG and NFCB oppose adoption of the proposed rule.

Respectfully submitted

STATION RESOURCE GROUP

NATIONAL FEDERATION OF COMMUNITY BROADCASTERS



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